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IN THE

Supreme Court of the United States

October Term, 1968

PIKES PEAK BROADCASTING COMPANY AND
SANGRE DE CRISTO BROADCASTING CORPORATION,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION AND
THE UNITED STATES OF AMERICA,
Respondents.

APPENDIX D

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FCC 68-393

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re
VUMORE VIDEO CORP. OF COLORADO, INC.,
COLORADO SPRINGS, COLO.
Requests for Special Relief Filed Pursuant to Section 74.1109 of the Commission's Rules

MEMORANDUM OPINION AND ORDER

(Adopted April 10, 1968)

BY THE COMMISSION: COMMISSIONER BARTLEY ABSENT; COMMISSIONERS LEE AND LOEVINGER CONCURRING IN THE RESULT; COMMISSIONER COX DISSENTING AND ISSUING A STATEMENT; COMMISSIONER JOHNSON DISSENTING AND VOTING FOR A HEARING.

1. On August 18 and 30, 1967, Vumore Video Corp. of Colorado, Inc., proposed operation of a CATV system in Colorado Springs, Colo. (ARB-138), which would carry the following television signals: KKTV (CBS) and KRDO-TV (ABC), both of Colorado Springs; KOAA-TV (NBC), Pueblo, Colo.; and KWGN-TV (independent), KOA-TV (NBC), KLZ-TV (CBS), KBTV (NBC), and KRMA (educational), all of Denver, Colo. The Colorado Springs and Pueblo stations place predicted grade A or better contours over Colorado Springs, while the Denver stations place predicted grade B contours over the city.

2. On September 18, 1967, Pikes Peak Broadcasting Co., licensee of station KRDO-TV, filed a petition for relief against importation of Denver television stations. KRDO-TV requests temporary and permanent relief against the carriage of the predicted grade B Denver signals,[1] pursuant to section 74.1109 of the rules, and requests that the matter be considered in an evidentiary hearing. On March 19, 1968, a similar petition for special relief was filed jointly by Metropolitan Television Co., licensee of station KOAA-TV, and by Sangre de Cristo Broadcasting Corp., a prospective assignee of KOAA-TV.[2]

3. Before considering the basic controversy, we first treat certain preliminary matters raised in connection with SR-973: Requests for consolidation of the instant case with several other pending CATV

[1] Petitioner does not oppose carriage of the Denver educational station, but suggests that its carriage be terminated upon activation of the proposed channel 8 educational station in Pueblo (application of Southern Colorado State College, file No. BPET-232, filed July 12, 1965). Our rules would normally require carriage of both stations, and we are not persuaded of a need to depart from them in this instance. Consequently, we will deny the requested relief as premature; however, the matter can be reopened by petition for special relief when channel 8 becomes operational in Pueblo.

[2] BALCT-342, filed Sept. 29, 1967; Sangre de Cristo Broadcasting is licensee of radio station KCSJ, Pueblo, Colo.

controversies have been made by Mullins Broadcasting Co., licensee of television broadcast station KBTV, Denver, Colo., KRDO–TV, KOAA–TV, and the National Association of Broadcasters; these parties request variously that SR–973 be considered (1) with CATV 100–297 and CATV 100–300, where waivers of the top-100 rules are being sought for CATV systems to operate in the Denver television market (ARB–41); (2) with an application of Mountain Microwave Corp. (file No. 3653–C1–P–68) for authority to provide common carrier relay of the Denver signals to a CATV customer in Pueblo; (3) and with a section 74.1105 notification by Pueblo TV Power, Inc., of intent to commence CATV operations in Pueblo.[3] We will deny all of the requests for consolidation. In view of the separate safeguards provided by section 74.1107 of the rules, it is our policy not to include pending requests under section 74.1107 in consideration of requests for special relief filed pursuant to section 74.1109 of the rules, and we see no reason to depart from that policy in this case. E.g., *Great Lakes Community TV*, FCC 68–24, —— FCC 2d ——. The microwave application involving relay of Denver signals to Pueblo is still being processed and it is not ripe for disposition. Pueblo TV Power's section 74.1105 notification has only recently been filed (February 27, 1968); two requests for special relief against the Pueblo proposal were filed on March 28, 1968,[4] and the period for opposition and reply pleadings has not yet expired. In view of these circumstances, and the fact that Vumore's section 74.1105 notification for Colorado Springs was filed some 7 months ago, we will not further deny Vumore its right to expeditious consideration of its proposal (sec. 74.1109(f) of the rules) because of possible later developments in Pueblo. We note, however, that many of the parties participating in the Colorado Springs case have also entered the Pueblo controversy, and much of the information submitted concerning ARB–138 may apply equally to both cities. In our consideration of the Colorado Springs case, therefore, we have taken into account the prospect of CATV in Pueblo and, to the extent possible, the potential impact in both communities.

4. On December 22, 1967, KRDO–TV attempted to expand the scope of this case to include certain collateral matters, i.e., activities of Vumore, which it claims affect the basic qualifications of Vumore's principals. We will comment upon the allegations briefly: KRDO–TV states that Vumore engaged in "premature" construction of the CATV system and microwave facilities (alleging violation of sec. 319 of the Communications Act as to the latter); that it engaged in deceptive and misleading promotional activities; and that it made political efforts to bring public pressure on the Commission. We hold that the Commission's regulatory program does not presently apply to CATV system construction, so that allegations concerning the laying of trunk

[3] A general request has also been made by KRDO–TV that all CATV activity in the area be considered by the Commission to determine cumulative impact, but KRDO–TV has not served its petitions on all such CATV systems so that they cannot be affected by our present action.

[4] On Mar. 28, 1968, a petition under rule 74.1109 to designate CATV proposal for evidentiary hearing was filed by Metropolitan Television Co. and Sangre de Cristo Broadcasting Corp. On the same date, Pikes Peak Broadcasting Co. filed a petition for relief against the carriage of Denver stations by Pueblo TV Power, Inc. (SR–3689). Also, on Mar. 21, 1968, a statement supporting the CATV proposal was filed by Southern Colorado State College, applicant for educational channel 8, Pueblo.

cable raise no questions; the allegation of "premature" microwave construction is now moot.[5] Alleged violations of section 319 of the act, moreover, do not by themselves raise character questions. A CATV operator's promotional methods are not normally a matter of Commission concern and we do not believe they are a consideration in determining whether to allow the inauguration of new CATV service.[6] The alleged political efforts were apparently directed to persuading the city of Colorado Springs to support a grant of the now-dismissed BPCAR–83. Since these efforts were made on the record, we can see no impropriety in them.

5. Having ruled on the collateral matters, we can now consider the basic controversy. KRDO–TV's pleadings are strung out from September 18, 1967, to March 19, 1968, and comprise some dozen documents with multifarious allegations.[7] We will attempt briefly to list the most pertinent: (*a*) That although the Denver stations place predicted grade B contours over Colorado Springs, they do not provide actual service; (*b*) that extension of "essentially distant" Denver signals would introduce new signals into the heart of a geographically and constitutionally separate market, and thus upset the Commission's Table of Assignments; (*c*) that the Colorado Springs audience will be fragmented to the economic detriment of existing and potential local television stations;[8] (*d*) that the addition of Denver stations would not provide any significant new programing diversity, since the market presently receives full network service; (*e*) that the program exclusivity rules will not protect local, public affairs, or independent nonnetwork programing which constitutes approximately 45 percent of its broadcast week, so that such programing will be curtailed; (*f*) that KRDO–TV as well as potential local UHF stations will be unable to compete with larger Denver stations in procuring independent programs; (*g*) that the market situation indicates without CATV the vacant UHF channels could be activated;[9] (*h*) that "phase II" of Vumore's CATV proposal envisions addition of several distant signals to fill out its system, which will further impair market integrity; (*i*) that Vumore's cross-ownership of CATV systems, television stations, and common carrier microwave systems raises public-interest questions,[10] currently the subject of the *Notice of Inquiry in Docket No. 17371*, FCC 67–460, 7 FCC 2d 853; (*j*) that the potential for establishing pay-TV in Colorado Springs by Vumore

[5] At the time, Vumore was an applicant for a community antenna relay station (BPCAR–83) to provide Denver signals to Colorado Springs. On Jan. 30, 1968, BPCAR–83 was dismissed at Vumore's request.

[6] Which is not to say that the Commission is unable to take appropriate action if it should be considered necessary. See *Pioneer Valley Cablevision, Inc.*, FCC 66–10, 5 FCC 2d 626.

[7] Included is the contents of a petition to deny, filed by KRDO–TV against BPCAR–83, which the station requested be incorporated in its pleadings concerning the instant case.

[8] Petitioner refers to Vumore's prediction that it will achieve 60 percent saturation in Colorado Springs within 7 years, and calculates that this will total 44,600 homes, or over 25 percent of the TV homes in the entire market.

[9] Commercial UHF channel 21 is assigned to Colorado Springs, and commercial UHF channels 26 and 32 are assigned to Pueblo. No applications are pending for any of these channels.

[10] Vumore operates CATV systems in 33 cities, while its parent, RKO General, Inc., owns seven AM and FM radio stations and five television stations. And its minority shareholder also has substantial CATV connections.

raises public-interest questions;[11] (*k*) that the Commission's efforts to reevaluate the use of translators, *Further Notice of Proposed Rulemaking and Notice of Inquiry in Docket No. 15971*, FCC 67–706, 8 FCC 2d 569, and to obtain information regarding the operation of its current CATV rules, *Notice of Inquiry in Docket No. 17505*, FCC 67–674, 9 FCC 2d 984, should not be undermined by institution of a CATV proposal touching the heart of issues involved; (*l*) that the Commission should apply the "presumption" of adverse economic impact contemplated in section 74.1107 to all markets, so that the burden falls upon Vumore to disprove injury and demonstrate the public interest and necessity for CATV in Colorado Springs; (*m*) that the Commission's premise of network UHF service in smaller markets does not apply to Colorado Springs because any new UHF station there would be independent; (*n*) and that this case should be consolidated with other CATV proposals in the area to determine cumulative impact on television, determine the future role of CATV, and regulate the amount of service which CATV should be allowed to provide.

6. When the Commission adopted the *Second Report and Order*, it determined that absent a special showing made pursuant to section 74.1109 of the rules, there is no need for prior evidentiary hearing before CATV service may be instituted in below top-100 television markets (pars. 144–146). This policy is grounded on the reasoning that CATV has less potential impact on UHF development in below top-100 markets, since broadcasters in such markets would normally be network affiliates and would receive substantial protection from the program exclusivity rules. KRDO–TV is an ABC affiliate sharing its below top-100 market with KOAA–TV (NBC) and KKTV (CBS), the latter not having requested special relief. Although UHF channels were furnished to this market in the Table of Assignments, and despite petitioner's recitation of favorable conditions for eventual further television expansion, no applications have been filed proposing commercial UHF operation, nor is there any indication of prospect that such applications will be filed. In addition, increased market station profits from 1962 to 1966, coupled with growth in the Colorado Springs area, support the conclusion that CATV and existing broadcast television will successfully exist in this market.

7. The specific allegations listed in paragraph 5 above have been lettered for convenience in our rulings, as follows: (*a*) KRDO–TV alleges that the Denver stations do not provide actual service to Colorado Springs—despite the presence of predicted grade B contours—but fails to support this argument with engineering evidence. See *Shen-Heights TV Association*, FCC 68–168, ——— FCC 2d, ———. In any event, the Commission's rules do not prohibit CATV systems outside the grade A contours of stations in top-100 television markets from importing distant signals. Consequently, the burden rests with KRDO–TV to present special circumstances affecting the

[11] Petitioner argues that despite a city ordinance banning per-program pay-TV, Vumore will maintain four closed circuit channels; that partial owner of Vumore is RKO General, Inc., a proponent of nationwide pay-TV; and that Vumore's financial resources would allow it to outbid local television stations for syndicated programing and films.

public interest which require the imposition of special restrictions on CATV, *Central New York Cable TV, Inc.*, FCC 67–1381, 11 FCC 2d 150, and this it has failed to do. Inter alia, we note that table II of exhibit L in the "Coe-Saunders Report" (which is discussed at greater length in par. 8) shows as many as 1,800 market households watch Denver at one time. Presumably this viewing occurs about Colorado Springs since Pueblo is beyond the predicted contours of the market stations. (*b*) The Commission strives to administer its CATV rules so as to insure that television stations are carried on CATV systems within their predicted contours, *Shen-Heights TV Association*, supra. Consequently, Commission policy contemplates that Denver signals be available on a Colorado Springs CATV system absent a showing that such carriage would not be consistent with the public interest. (*c*) It is likely that carriage of Denver signals could have some economic effect on existing and potential television stations; however, it does not appear that the potential impact would be sufficient to threaten the viability of existing or potential stations, and, consequently, this does not provide a public-interest consideration warranting the relief requested. (*d*) This argument overlooks the public benefits which may stem from improved reception, and the convenience of receiving some programs at different hours. However, we agree that the possible programing diversity promised by the CATV would not, by itself, justify the installation of the CATV system. But this is not the question. Rather, since our rules place the initial burden of persuasion on petitioners in this type of case, the question is whether the petitioners have shown possibility of adverse impact upon the public interest. And, as indicated, we conclude that the petitioners have not met this burden. (*e*) This allegation is not sufficiently supported factually. In addition, we note that exhibit L of the "Coe-Saunders Report" indicates very little programing which could be affected. (*f*) This allegation is not adequately supported. In addition, we note that KRDO–TV is a network affiliate, so presumably the bulk of its programing will be obtained through the network. (*g*) General allegations in this regard are made in the pleadings, though without support, and the "Coe-Saunders Report" considers at length the argument that a UHF potential exists. However, as indicated above, our analysis of this market indicates no likelihood of UHF activation in at least the near future. (*h*) Vumore's alleged "phase II" is not an issue here, and can be raised under section 74.1109 if it later materializes. (*i*) Cross-ownership is not prohibited by the Commission's rules and the Commission retains adequate authority to deal with the question should action later appear desirable. In this regard, we note that the general question of cross-ownership between CATV operators and other Commission licensees is currently under study in docket No. 17397; however, we note that any cross-ownership present in this case is not within the same television market. Consequently, we do not believe that the cross-ownership is sufficient to require hearing. (*j*) Pay-TV is prohibited by the terms of Vumore's franchise, and KRDO–TV's arguments that it may later arise are completely speculative. Further, the Commission determined in the *Second Report and Order* that the possibility of pay-TV poses less

of a threat in the below top-100 television markets. Petitioner has not persuaded us to the contrary. (*k*) The matters under study in docket No. 15971 relate to possible improvement in translator service, while the inquiry in docket No. 17505 is concerned only with practical experiences in the operation of our rules. The matters under study in these proceedings are, therefore, simply irrelevant to the present controversy. (*l*) The Commission explained in the *Second Report and Order* as well as the *Reconsideration of the Second Report and Order* why it is appropriate to place the burden of proof on the objector in below top-100 proceedings, and see paragraph 6, supra. Petitioners' general arguments do not show any need to depart from this policy determination. (*m*) Although it is undoubtedly true that a UHF entering this market would be independent, we have decided that the available information indicates no prospect of early UHF activation. (*n*) This has been dealt with in paragraph 3 above. In short, KRDO–TV has failed to establish special circumstances which would justify grant of the special relief it has requested, *Central New York Cable TV, Inc.*, FCC 67–1381, 11 FCC 2d 150.

8. In addition to the arguments contained in the pleadings, discussed in the preceding paragraphs, on March 11, 1968, the licensees of KRDO–TV and KOAA–TV filed an economic study, entitled "An Analysis of the Colorado Springs-Pueblo Television Market: Its History, Status, and Future" ("Coe-Saunders Report"), which is intended to support the asserted need for a hearing. We have carefully considered this filing, but do not feel that it is sufficiently supported to justify a hearing. Nonetheless, we believe the filing of this type of study has value, so we will set forth our most immediate objections in the hope they will be met in any similar filings in the future.

(*a*) Procedurally, the study was filed hopelessly late. In this regard, we note that there is no claim that Vumore was ever advised of the commissioning of the study or given any opportunity either to consult on methodology or to supply relevant data. Thus, it is only fair to assume that Vumore was surprised by the study and thus deprived of any opportunity to respond in kind. We recognize that economic studies are frequently prepared without consultation in adversary proceedings and we normally do not object to the practice, since it does not intrude on basic fairness. But here, petitioners were aware that section 74.1109(f) of the rules requires expeditious action, so that the sudden, though belated, appearance of the study could deprive Vumore of either its right to expeditious action or the opportunity to obtain a rebuttal study.

(*b*) As with the pleadings discussed in the preceding paragraphs, the study fails to supply the specific information called for in *Central New York Cable TV, Inc.*, FCC 67–1381, 11 FCC 2d 150. In this regard, we note that, rather than supply balance sheet data which could be subjected to accounting analysis, exhibit F of this filing includes a "composite" form 324 which, by its nature, precludes any attempt at analysis to determine such matters as depreciation rates. Consequently, while the study proposes interesting generalities they are somewhat unrelated to the specifics

of the stations and market in issue. And we note that no market licensee represents that it fully endorses the study.

(*c*) Our analysis of the specifics of the study raises further questions, the most pertinent of which we will discuss. In exhibit G, the researchers project continued increase in market revenues and urge that this may eventually attract UHF entry. Leaving aside the question of UHF entry for the moment, it appears that the projected increases would be sufficient to protect the viability of existing market stations whether or not CATV is allowed into Colorado Springs.

(*d*) Experience in the broadcast industry does not persuade us that the profitability of VHF stations in a market assures comfortable UHF entry. Petitioners seek to buttress their projections of increased market revenues, as an inducement to UHF entry, by reference to the four-station Las Vegas market. Unmentioned is the fact that the fourth station in Las Vegas is VHF, nor does the study claim that the fourth Las Vegas station is profitable. Finally, the study seeks to overcome the threshold question whether this market is or soon will be attractive for UHF entry by assuming its answer. This is an unsatisfactory method in an adjudicatory proceeding, and we must reject it.

(*e*) Although we cannot accept the proposition that the report establishes any likelihood of UHF entry, its failure to persuade is not conclusive of the question. Consequently, we will consider the material designed to show the impact of CATV on a hypothetical market UHF. The report relies on Bakersfield experience as analogous without sufficiently distinguishing other similar markets where no claim is made that CATV has had any injurious effect. Further, the report overlooks that Bakersfield—one of the deintermixture markets—has had a history of economic problems. This history is not mentioned, nor is attempt made to show how CATV has compounded preexisting problems. Instead, reliance is placed on an ARB report of Bakersfield viewing and resulting projections. These projections appear valueless, since:

1. The ARB report states that its "data are below ARB minimum standards" and suggests that the results be treated as "indicative only."

2. No figures are given on the size of the CATV audience in Bakersfield, so that it is not at all clear that the claimed drop of market viewing could reflect CATV homes.

3. The various charts and graphs do not discuss viewing habits in the crucial prime-time hours when the bulk of network revenues are earned, and when program exclusivity should be of maximum value (for example, table II only gives data from 7–7:30 p.m. and from 11 p.m. on). Consequently, the apparent efforts to project non-prime-time viewing patterns in Bakersfield into prime-time viewing in Colorado Springs-Pueblo is totally unpersuasive.

4. Table III is an apparent miscalculation. Proceeding from the assumption that 90,000 households are involved [12] and that program exclusivity will not be provided despite Commission rules to the contrary, it provides figures involving percentages of penetration and viewing which are nowhere else claimed to be at issue.

In view of these objections, we must reject this portion of the report as not supported.

(*f*) Various conclusory arguments are advanced throughout the report. Two of these, based on the assumption of increased market revenues absent CATV, merit mention. First, it is asserted that licensees may "finally" anticipate "a reasonable return on their investment," but no supporting economic data is offered. And see *Federal Communications Commission* v. *Sanders Brothers Radio Station*, 309 U.S. 470. Second, it is asserted that revenue growth in the market should permit stations to expand service in such areas as local news and local public service. This assertion seems plausible, but neglects the fact that recent renewal applications for two of the three market stations propose cutbacks in local programing. In this regard, we note the assertion that too-severe CATV competition could cause local programing to suffer, but we also note the lack of supporting accounting data.

(*g*) Finally, we consider exhibit L, which seeks to establish that program differences between Denver and Colorado Springs-Pueblo are minor, that CATV will not serve a significant function in providing program diversity, and that only 11 percent of the programs broadcast by Denver network stations are not broadcast by the market stations. Conceding that this exhibit has weight on these points, it impeaches arguments made elsewhere, since it reveals the limited nature of the programing which will not receive protection from program exclusivity. Inter alia, it would have been helpful if exhibit L revealed broadcast times since, as framed, it is not clear that even 11 percent of the program time of the stations is not subject to program exclusivity.

In conclusion, although praiseworthy effort has been made to supply pertinent data, we conclude that the report is insufficient to show that hearing is warranted.

9. In view of the foregoing, we find that the proposed operation of Vumore's CATV system in Colorado Springs will be consistent with the public interest.

Accordingly, *It is ordered*, That the petition for relief against importation of Denver television stations, filed on September 18, 1967, by Pikes Peak Broadcasting Co., directed against Vumore Video Corp. of Colorado, Inc.'s section 74.1105 notifications, *Is denied*.

It is further ordered, That the petition for special relief, filed on March 19, 1968, by Metropolitan Television Co. and Sangre de Cristo

[12] Which is not so. Exhibit A of the report lists the 1966 populations of Colorado Springs as 97,500 and Pueblo as 99,300. Totaling these figures and dividing by 3.3 to obtain TV households indicates that the correct figure for TV households is 59,633. The report's assumption is based on households in the counties where these towns are located—but the report does not claim to consider CATV in the counties or explain how CATV is to reach rural populations.

Broadcasting Corp., directed against Vumore Video Corp. of Colorado, Inc.'s section 74.1105 notification, *Is denied.*

It is further ordered, That the comments of Mullins Broadcasting Co. on petition for relief against importation of Denver television stations, filed by Pikes Peak Broadcasting Co., *Are denied.*

It is further ordered, That the petition to consolidate, filed on January 4, 1968, and the petition to consolidate, filed on February 13, 1968, by Pikes Peak Broadcasting Co., *Are denied.*

It is further ordered, That the petition to consolidate and set the above-captioned matters for evidentiary hearing, filed on March 12, 1968, by the National Association of Broadcasters, *Is denied.*

It is further ordered, That Vumore Video Corp. of Colorado, Inc., *Is authorized* to operate its Colorado Springs, Colo., CATV system as proposed in its section 74.1105 notifications of August 18 and 30, 1967.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

DISSENTING STATEMENT OF COMMISSIONER KENNETH A. COX

I must dissent. This is an extremely complex and important case—witness the number and volume of pleadings and other filings and the intervention of the National Association of Broadcasters. I wish I could deal with the matter at greater length, but will have to be content with a hurriedly prepared commentary on the majority's opinion.

First, I think that this is only part of a bigger picture. For some reason some of the most elaborate CATV operations yet devised are proposed for the Denver-Colorado Springs-Pueblo area. I think that all of these proposals should be considered together, including the related microwave applications, as was requested by the NAB and certain of the broadcasters in these communities. Certainly, common issues are presented, and the critical ultimate issue is the cumulative impact of present and projected cable operations upon present and potential local broadcast operations in the area. I do not think the majority are in a position to make a really informed judgment when they deal with just one small part of the overall complex. For example, in the last sentence of paragraph 4 they say that in considering this case, involving Colorado Springs, they have also "taken into account the prospect of CATV in Pueblo." After this bold statement, they never again refer to the Pueblo proposal—and to the best of my recollection it was never discussed during our all too brief consideration of this matter.

The majority point out, in paragraph 6, that since Colorado Springs-Pueblo is not among the top-100 markets of the country, there is no need for an evidentiary hearing before CATV service may be instituted unless the broadcasters seeking special relief above and beyond our rules make a special showing justifying such a hearing. While I dissented to that part of the *Second Report and Order* which withheld protection against the importation of distant signals from broadcasters in the smaller markets who, in my judgment, normally need it even more than their counterparts in the top-100 markets, I

recognize that this is the policy to be applied here. But I think the majority have here written section 74.1109 right out of the rules as far as broadcasters in small markets are concerned.

If the very substantial showing made here is not adequate to entitle the local broadcasters to a hearing in which they can undertake to prove their allegations, then I think it very unlikely that such a showing can be made. Surely, the broadcaster seeking relief under section 74.1109 is not required to prove his case in his pleadings. It must be enough if he tenders specific, factual allegations which, if proved, would entitle him to relief.

Here, very substantial pleadings have been filed which seem to me to raise substantial factual issues, and they have been supported by a study which is the most voluminous and detailed I can recall having been filed in any section 74.1109 case. While there may be gaps or flaws in it which would have to be tested if a hearing were held, it was prepared by two responsible and respected members of the faculty of the School of Communications of Ohio University in Athens, Ohio, both of whom have had prior experience in the broadcasting industry. They had assistance from another faculty member and a graduate student with impressive qualifications, including backgrounds in qualitative research and in broadcast ratings. Their study seems to have involved the use of standard research techniques, and is certainly of sufficient stature to merit detailed examination in a hearing. When I consider the flimsy showings upon which the majority have granted cable operators' requests for waiver of our top-100 market policy, I am appalled at their rejection of this no doubt imperfect but, nonetheless, very significant study.

I not only think the majority are acting arbitrarily in rejecting the study, on the basis of very selective discussion of a few of its elements,[1] but I am concerned about the force of this action as a precedent. What small-market broadcaster, noting the cavalier treatment given to this very substantial effort, is likely to expend the time and money involved in such research in a future effort to obtain relief under section 74.1109? Yet the Commission, in adopting that provision of the rules and in its discussion of the question in the *Second Report and Order*, specifically represented that upon a proper showing it would designate a small-market broadcaster's request for special relief for an evidentiary hearing. The majority have already denied such requests for hearings in a number of cases. In some of these I agreed that the broadcaster's showing was inadequate, consisting of mere conclusionary pleading. In others, I thought the showings, though much less substantial than the one made here, were sufficiently specific to justify hearings. But none of those actions went so far as this one toward making a dead letter of section 74.1109.

Furthermore, this result is clearly inconsistent with the Commission's action in the one case I can recall where we designated a matter of this kind for hearing. That was *Taft Broadcasting Company (WKYT-TV)*, 5 FCC 2d 746. There, the four communities where cable operations were proposed were from 24 to 33 miles from Lexing-

[1] I will discuss the majority's treatment of the study in more detail below.

tor; here, the CATV system is to be built right in Colorado Springs, with a similar operation proposed for Pueblo, thus putting cable operations right in the dual heart of this hyphenated market. There, the CATV system's subscriber potential would have represented a minute percentage of the total homes in the market. Here, Vumore predicts 60 percent saturation in Colorado Springs within 7 years, which Pikes Peak calculates would represent over 25 percent of the TV homes in the entire market. I recognize there are differences between the cases. Lexington is an all-UHF market, while this one has three VHF stations but any additional stations will be UHF. And the signals sought to be barred in the Lexington case were those of distant stations, while the Denver stations here involved provide a predicted grade B signal to Colorado Springs. But I don't see how anyone studying these two cases can avoid the conclusion that the proposal here involves a much more serious threat to the local stations, present and potential, than that in the Lexington case. So why the difference in treatment?

In addition, the broadcasters here have pointed out very clearly that the rationale advanced in the *Second Report and Order* for differentiating between the top-100 markets and those below that cutoff point does not apply here. The majority say that this difference in policy "is grounded on the reasoning that CATV has less potential impact on UHF development in below top-100 markets, since broadcasters in such markets would normally be network affiliates and would receive substantial protection from the program exclusivity rules." Actually, what paragraph 145 of the *Second Report* says is:

> * * * In markets below the top 100, the independent UHF (or VHF) station is much less likely to develop; the stations in such markets are apt to be three or less in number and network affiliated. This means, in turn, that the nonduplication provision is effective (since network programing will be significantly involved), and protection of a station's network programing should contribute very substantially to insuring its continued viability. * * *

But here this smaller market already has three network-affiliated stations, so that any new station will be an independent as to whom the assumption of benefit from the nonduplication rule is inapplicable.

In the face of this, the majority blandly say:

> Although UHF channels were furnished to this market in the Table of Assignments, and despite petitioner's recitation of favorable conditions for eventual further television expansion, no applications have been filed proposing commercial UHF operation, nor is there any indication of prospect that such applications will be filed.

These allocations were made by this Commission to provide for reasonably expanded service in this television market, the second largest in the State of Colorado. While the allocation of a television channel is no guarantee that a station will be built to operate on it, the Commission no longer makes allocations simply because a channel will fit in a given location. Our present Table of Assignments is an unsaturated one, including provision only for those communities thought to have some potential for supporting additional stations. It is precisely that potential for expanded free local service for all in the area that our CATV rules are supposed to preserve. We said in the *Second Report and Order*

that we wanted to take hold of the future, but the majority now seem intent on giving it away.

They seem to be saying that no effort should be made to preserve the potential for additional UHF stations unless applications are on file. I think this is a terribly shortsighted attitude which will insure that no one will ever apply for these channels. I think the majority are clearly in error in saying that there is no "indication of prospect that such applications will be filed." Certainly, the local broadcasters have not proven that one or more of these channels will be occupied, but I think they have offered a rational argument that conditions in the market are such that there is a real possibility that an additional station will be built. Certainly, I think their showing is substantial enough to justify exploring the matter in a hearing. But this assumes that a prospective applicant would face the competition of just the three local stations. I admit that it may require some courage to build an independent station in a market of this size, but I think that, without CATV complications, one or more additional services could be expected in time. But I think it would be foolhardy for anyone to put a new station on the air in competition with seven commercial signals—much less the further fragmentation portended by Vumore's projected phase II. I think that the majority have here ended all possibility that Colorado Springs-Pueblo will get additional local service—the only kind that the rural population and the low-income urban residents could look forward to. This is not my idea of the way to go about building an expanded nationwide television system.

The majority have undertaken to list the "most pertinent" allegations of KRDO–TV[2] in paragraph 5, lettering them for identification, and have then purported to answer them, in the same order, in paragraph 7. There is not time to deal with all of these matters, but I would like to consider what I believe to be the most important ones. For this purpose I will use the same letter identifications employed by the majority. In each case I will paraphrase or quote the majority's characterization of KRDO's *allegation*, together with their *answer*, and will then add my *comment:*

(*a*) *Allegation.*—That although the Denver stations place predicted grade B contours over Colorado Springs, they do not provide actual service.

Answer.—KRDO fails to support this argument with engineering evidence. In any event, since Colorado Springs is outside the grade A of any top-100 market station, the rules do not prohibit importation of distant signals and KRDO has the burden of presenting special circumstances requiring special restrictions on CATV—and this it has failed to do. Furthermore, table II in exhibit L (apparently they mean exhibit B) in the "Coe-Saunders Report" shows that as many as 1,800 market households watch Denver at one time.

Comment.—This last is true for the nighttime hours, but that represents less than 2.5 percent of the market homes viewing the

[2] No reference is made to the pleadings filed by the other broadcast interests here, except for the study filed jointly by KRDO and KOAA. I have not had time to see whether they raised additional points, so will simply deal with those listed by the majority.

three local stations during the same periods. This seems to me clearly to substantiate KRDO's claim that Colorado Springs-Pueblo, by virtue of terrain obstruction and the history of television development in the area, is a completely distinct television market with its own three network-affiliated stations and with very little penetration from the nearby Denver market. Clearly, carriage of the Denver stations on a CATV system in Colorado Springs will make their signals fully as accessible as those of the local stations and will presumably result in increased viewing of the Denver signals—with resultant fragmentation of the local stations' audiences.

In any event, KRDO is not arguing that the Denver stations' grade B contours do not encompass Colorado Springs or that their signals are not viewed minimally there, so there is no need for an engineering showing. Rather, it urges that the two markets, despite interpenetration, are much more distinct than the Baltimore and Washington markets discussed in footnote 69 of the *Second Report and Order*. We there stated an exception to the general proposition that CATV activity not involving extension of a signal beyond its grade B contour may freely continue, noting that "if two major markets each fall within one another's grade B contour (e.g., Washington and Baltimore), this does not mean that there is no question as to the carriage by a Baltimore CATV system of the signals of Washington; for in doing so and thus equalizing the quality of the more distant signals, it might be changing the viewing habits of the Baltimore population and thus affecting the development of the Baltimore independent UHF station or stations." If you substitute Denver for Washington and Colorado Springs for Baltimore, this statement fits the present case. I think the pleadings clearly require a hearing to permit detailed consideration of this matter. The course adopted by the majority completely ignores the footnote 69 issue and disposes of the case as if this were a run-of-the-mill request by a small-market broadcaster for extraordinary relief to protect his outlying coverage area.

(*b*) *Allegation.*—That extension of "essentially distant" Denver signals would introduce new signals into the heart of a geographically separate market, thus upsetting the Commission's Table of Assignments.

Answer.—The Commission tries to administer its CATV rules so as to insure that stations are carried on CATV systems within their predicted contours, so that Denver signals should be carried on a Colorado Springs system absent a showing that this would not be consistent with the public interest.

Comment.—This argument is related, of course, to the preceding one. There can be no doubt that the majority are permitting, in a practical sense, the introduction of signals not now a serious factor in the market, and that this materially alters the plan for local service in Colorado Springs that is embodied in our Table of Assignments. The Commission's reply again disregards footnote 69, which clearly states that different problems are posed in situa-

tions of this kind. Their recital of the assumptions underlying our basic top-100 market rule is, therefore, inappropriate. As indicated above, I think the local stations have made a showing that carriage of the Denver stations would not be consistent with the public interest.

(*c*) *Allegation.*—That the Colorado Springs audience will be fragmented to the economic detriment of existing and potential local television stations.

Answer.—The majority concede that carriage of the Denver signals could have some economic effect on existing and potential stations, but that it does not appear the impact would be sufficient to threaten the viability of existing or potential stations.

Comment.—Whereas KRDO's allegation is substantially supported, the majority simply state their contrary conclusion without explanation.[3]

(*c*) *Allegation.*—That the program exclusivity rules will not protect local, public affairs or independent nonnetwork programing which constitutes approximately 45 percent of KRDO's broadcast week, so that such programing will be curtailed.

Answer.—This allegation is not sufficiently supported factually. In addition, exhibit L of the "Coe-Saunders Report" indicates very little programing which could be affected.

Comment.—The allegation that the program exclusivity rules will not protect the nonnetwork programing of the Colorado Springs-Pueblo stations is obviously true and needs no detailed factual allegations to support it. The claim that this will result in curtailment of such programing is more problematical, but I think KRDO and KOAA, in their pleadings and in the Coe-Saunders study, have alleged enough facts to require a hearing. For example, they have shown that the Colorado Springs-Pueblo market is peculiarly vulnerable to CATV impact because a high percentage of the audience in the market lives in the metropolitan areas of the two central cities; that the Denver stations are not now a serious factor in this market, but will provide heavy competition if carried on cable systems there; that a significant part of the local stations' programing is nonnetwork and will be duplicated by the Denver stations, often in advance, so that the local stations' schedules will be less attractive and their audiences will be smaller; and that this has happened in Bakersfield, which is a comparable market. It seems to me that this adds up to a real likelihood that the local stations will have reduced revenues and will be forced to curtail their program service. The majority clearly misinterpret exhibit L of the Coe-Saunders study. This exhibit simply shows the types and number of programs broadcast by the stations in Colorado Springs-Pueblo which are not also broadcast by the Denver network-affiliated stations—and vice versa. It does not in any way affect the fact that only 55 percent of KRDO's programing will be protected against fragmentation

[3] They do comment, in par. 8, on some aspects of the Coe-Saunders study which relate to this argument. I will discuss this below.

by the Denver network-affiliated stations—and none of it will be protected against competition from the Denver independent.

(*f*) *Allegation.*—That KRDO, as well as potential local UHF stations, will be unable to compete with the larger Denver stations in procuring independent, that is, syndicated and feature film, programing.

Answer.—Again, the majority simply say that this allegation is not adequately supported, also noting that KRDO is a network affiliate so presumably obtains the bulk of its programing through its network.

Comment.—Again, I think KRDO's allegations are adequate. In addition, it cites the Commission's own statement in paragraph 123 of the *Second Report and Order* with respect to the disadvantage independent UHF stations would have in competing with the big city independent VHF stations likely to be brought in from bigger markets by the CATV operator. I think this has relevance to the problem of a station in a smaller market in trying to buy syndicated programs and feature film when a station in a larger market which is imported into the smaller market by cable systems is also bidding for such programs. It seems quite likely that the Colorado Springs-Pueblo stations will take a back seat in such negotiations. The statement about KRDO's getting most of its programing from its network is utterly irrelevant, since the station's argument here goes only to its acquisition of *non*-network programing.

(*g*) *Allegation.*—That the market situation indicates that without CATV the vacant UHF channels could be activated.

Answer.—The general allegations to this effect in the pleadings are unsupported, and while the "Coe-Saunders Report" argues that there is a UHF potential, our analysis of the market, as indicated above, indicates no likelihood of UHF activation in at least the near future.

Comment.—Here, the majority again use the handy formula that this allegation is "without support" in the pleadings. When required to consider the Coe-Saunders study, they avoid the issue by referring to a market analysis which they say is "indicated above." This must refer to paragraph 6, where all the majority says about this issue is:

> Although UHF channels were furnished to this market in the Table of Assignments, and despite petitioner's recitation of favorable conditions for eventual further television expansion, no applications have been filed proposing commercial UHF operation, nor is there any indication of prospect that such application will be filed.

It is clear that whatever analysis the majority have made of the Colorado Springs-Pueblo market, they do not propose to reveal their reasoning to anyone. I think this is arbitrary and capricious. Furthermore, while not without flaws, I think the Coe-Saunders study makes a persuasive case that the market can, in the near future, support at least one more station. Certainly, I think this showing is adequate to necessitate a hearing before writing off for good and all the additional allocations we have made for this market.

(*h*) *Allegation.*—That phase II of Vumore's CATV proposal envisions addition of several distant signals to fill out its system, which will further impair market integrity.

Answer.—Vumore's alleged phase II is not an issue here, and can be raised under section 74.1109 if it later materializes.

Comment.—I don't know why the majority seem so dubious about phase II. In KRDO's petition to deny, dated December 4, 1967, it clearly alleges that Vumore is constructing a 20-channel system and has promised the delivery of Los Angeles and San Francisco signals in addition to those from Denver. Exhibit 3 attached to the pleading includes a page from Vumore's proposal to the Colorado Springs City Council. It is entitled "phase II" and lists 20 channels of programing, including the three local stations, five Denver stations, plus a proposed Denver UHF station, six Los Angeles independent stations, one San Francisco independent station, and four closed circuit channels (weather, news wire, Wall Street market reports, and a sports wire). That seems specific enough to require consideration of Vumore's entire proposal, and I think the majority's refusal to do so is irresponsible. Clearly, this would represent overwhelming fragmentation of the Colorado Springs-Pueblo audience, most of it by independent stations as to which our nonduplication rules provide no protection. I think that importation of the five Denver signals will block any UHF development in this market, so that when the majority finally gets around to considering phase II they will have even stronger grounds for concluding that Vumore's elaborate plans—the most extensive to come formally before the Commission thus far—pose no threat to UHF expansion; and their analysis of the allegations here gives me no confidence that they will do any better with a determination of the question of impact of further imported signals on the existing stations. In addition, if the system is fully built on this foot-in-the-door basis, the pressure to approve the expansion of its service will be enormous. I think we should consider the whole package now.

(*j*) *Allegation.*—That the potential for establishing pay television in Colorado Springs by Vumore raises public-interest questions; that despite a city ordinance banning per-program pay-TV, Vumore will provide four closed circuit channels; that RKO-General, Inc., a major stockholder in Vumore, is a proponent of nationwide pay-TV; and that Vumore's financial resources would allow it to outbid the local stations for syndicated programs and films.

Answer.—Pay-TV is prohibited by the terms of Vumore's franchise, and KRDO's arguments that it may later arise are completely speculative. Further, the Commission determined in the *Second Report and Order* that pay-TV poses less of a threat in markets below the top 100 and petitioner has not persuaded to the contrary.

Comment.—I think KRDO's allegations in this respect are substantial and merit exploration in a hearing. The limit on pay-TV set forth in Vumore's franchise clearly falls short of

prohibiting the provision of nonbroadcast programing on vacant channels for an incremental monthly charge. The majority's assertion in the *Second Report* that pay-TV is less of a threat in smaller markets does not mean that there is no possibility of its developing in communities like Colorado Springs. Vumore itself conducted an experimental pay-TV operation—of the kind which would be possible under its franchise here—in the late 1950's in Bartlesville, Okla., which is smaller than Colorado Springs. That operation failed, but times have changed and such an operation here would be part of a broader and almost certainly profitable CATV service.

The majority then turn to the "Coe-Saunders Report" and set forth their principal objections to it. First, they complain that it was filed too late and that Vumore was given no notice of the commissioning of the study and no chance to consult on methodology or to supply relevant data; so was presumably "surprised" by the study and deprived of any opportunity to respond in kind.

Vumore gave the required section 74.1105 notice of its intention to commence a new cable TV service in Colorado Springs on August 16, 1967. KRDO filed a timely petition for relief against importation of Denver television stations on September 18, 1967. Vumore filed an opposition to petition of KRDO–TV against carriage of Denver stations on October 25, 1967. On December 4, 1967, KRDO filed a petition to deny directed against Vumore's application for a Community antenna relay station to serve its proposed CATV system in Colorado Springs. Apparently, Vumore did not reply to this, but instead withdrew its application on January 30, 1968. A good many additional and related pleadings have been filed by these parties, as well as by other broadcast and cable interests. There is no indication of any undue delay in the filing of any of these papers, and it appears to me that we have reached and disposed of this matter quite expeditiously.

I find no indication of the date on which the Coe-Saunders study was commissioned. In any event, the substantial size and character of the report indicates that it must have taken some time to compile, especially since it was prepared by men who obviously had other basic academic commitments requiring a good deal of their time. Though the study is dated February 1968, one element on which it is based, a special tabulation as to the Bakersfield market prepared by ARB, is dated March 7, 1968. The completed report was filed under cover of a letter dated March 11, 1968, which recites that the study was completed March 10, 1968. If the Commission is going to insist on detailed showings in these cases it must allow time for their preparation. I do not think this one was untimely filed.

Nor do I know of any requirement that a party notify his adversary of the undertaking of a study of this kind for use in cases of this type. Indeed, the majority recognize that economic studies are frequently prepared without consultation in adversary proceedings, but apparently find that section 74.1109(f) imposes a different requirement. I do not so read the rule, and if the majority intend to require some kind of notice with respect to studies of this kind I think they

should clearly spell out their policy in some detail so that interested parties will be fully informed.

Despite these strictures the majority purport to have considered the study, but say that they "do not feel that it is sufficiently supported to justify a hearing." I disagree, and really cannot understand what more the majority can require at this stage in proceedings such as this. While the study is not dispositive of a final decision on the merits, I think it clearly establishes the need for a hearing.

The majority say that the study fails to supply the specific information called for in *Central New York Cable TV, Inc.*, 11 FCC 2d 150. We said there:

> "* * * In the case of relief requested waiver of section 74.1107, this means that full and precise facts must be presented demonstrating why it is believed that such waiver action would be consistent with 'the establishment and healthy maintenance of television broadcast service in the area' (74.1107(a)). Obviously, a person asking the Commission not to apply a rule which it has adopted is expected to provide a full and detailed justification for the exception. The waiver petition must, therefore, develop the available facts concerning the cumulative effect of operation of this system, together with all other systems (in operation or proposed) similarly situated in the pertinent predicted grade A area (e.g., at similar or greater distances from the main community), on existing stations and on the prospects for activation of channels not yet on the air (in terms of such factors as probable audience, revenue, income, and program service, including likelihood of network affiliation). Parties may, of course, bring to our attention and we will consider on our own motion other information or considerations deemed relevant to a determination of the public interest in the particular situation.
>
> "6. Similar considerations as to cumulative effect and effect on likelihood of obtaining a network affiliation are applicable in the case of the 74.1109 petition requesting relief in the below top-100 market situation.[7] In this connection, we also note our recent statement in *Quincy Cablevision, Inc.*, FCC 67-981:
>
> > "The showing which it was thought would have to be made was expected to include 'specifies regarding its present financial condition, the impact any present CATV activity has had on its operation, or the exact nature of the other CATV operations it refers to.' E.g., *GT&E Communications, Inc.*, FCC 67-134, 6 FCC 2d 643.[2] While these considerations are not intended to be all inclusive, it is obvious that some demonstration along these lines must be made if the request for special relief is to be viewed as more than mere speculation. Similarly, we believe it reasonable that a network affiliated station, arguing that it will not be adequately protected by the program exclusivity requirement, make some factual showing. Compare *Jonesboro Cable TV, Inc.*, FCC 67-282, —— FCC 2d ——. This serves to direct hearing resources to those cases where it appears that an evidentiary hearing record would be substantial assistance in ultimate decision." [Footnotes omitted.]

It seems to me that, on the contrary, the study supplies the kind of information referred to, plus a lot more. Since the cable system here is in the heart of the market, it is clear that the majority would rule similarly in any community in the market where anyone wanted to build a cable system, so that the cumulative impact would presumably involve every community large enough to support a system. Certainly, a great deal of attention is given to the specific impact of the proposed systems in Colorado Springs and Pueblo (the "other CATV operations" referred to), both in terms of the existing stations and the prospects for activation of additional channels—and this is done in

terms of the indicated factors of probable audience, revenue, income, and program service, and with due regard for the fact that a new station would not have a network affiliation. Specifics are given as to the financial condition of the existing stations. No claim is made that present CATV activity has had any impact on the existing stations, since "The only other CATV systems authorized and/or operating are mainly on the fringes of the Colorado Springs-Pueblo television coverage area and are of extremely small size (see exhibit C)." While it may be true that the study does not label its data precisely in accordance with the terminology of the *Central New York* case, it contains everything called for—and much more. I, therefore, think the majority's statement is completely in error.

The majority note particularly that instead of supplying balance sheet data which could be subjected to accounting analysis, the study includes a composite form 324 which does not permit determination of such matters as depreciation rates. I do not understand this sudden interest in depreciation rates, because I cannot recall any other CATV case in which the Commission has given consideration to depreciation policies. In any event we have the individual form 324's for these stations, as well as the balance sheets filed triennially in connection with their renewal applications, so that the majority could have consulted these if they wished further data.

The majority then state:

> Consequently, while the study proposes interesting generalities they are somewhat unrelated to the specifics of the station and market in issue. And we note that no market licensee represents that it fully endorses the study.

I find these two statements incomprehensible. The study is replete with data which relate directly to the Colorado Springs-Pueblo market, and it seems to me that the conclusions drawn therefrom are reasonable enough to require further hearing on the matters discussed. The study was submitted on behalf of the licensees of KOAA–TV and KRDO–TV by their respective counsel, and as far as I can determine each of these stations vouches for the report and relies on it.

The majority then discuss further questions which they believe are raised by the report. They attack exhibit G on several grounds. First they say that its projection of continued increase in market revenues seems sufficient to protect the viability of the existing market stations even if CATV is allowed in Colorado Springs. This simply does not follow. The projected revenues set forth in exhibit G are explicitly based on the assumption that no serious CATV penetration occurs in the market. Other portions of the study, particularly exhibit H, reasonably suggest, however, that CATV penetration would quite probably result in a loss of $200,000 in revenue, which, because of the market's high expense-to-revenue ratio, could cause the closing of at least one of the existing stations.

The majority then say that VHF station profitability in a market does not insure comfortable UHF entry. While this has a ring of reasonableness, it is essentially meaningless. Certainly, VHF profitability is more favorable to UHF entry than unprofitability would be. And no one is predicting "comfortable" entry for a putative UHF station in this market. Nearly all new stations, VHF and UHF alike,

lose money in their early years of operation. The question is whether at some point in the reasonably foreseeable future someone will decide that conditions are favorable enough to justify applying for authority to build a station in the market. I think the study indicates sufficient potential for such a development to require a hearing to determine whether CATV penetration of the heart of the market would be likely to frustrate this prospect for additional local free television service.

It is then noted that the study refers to the construction of a fourth station in Las Vegas, which is a smaller market than Colorado Springs-Pueblo. However, it is pointed out that the study ignores the fact that the Las Vegas station is VHF and that it is not claimed that the station there is profitable. While a VHF station certainly has its advantages, there is significant interest in building independent UHF stations as well. The point being made is that even in this smaller market, someone has made the judgment that there is sufficient potential to justify building a fourth station. As noted above, it is not surprising that the Las Vegas station may not have achieved profitable operation, since it has only been on the air since September 1967.

The majority then say that on this question the study assumes its answer. I think this is a completely inaccurate characterization of the study, which goes into this whole issue at substantial length. In fact, the majority demonstrate a much greater proclivity for assuming their conclusions than do the authors of the study.

The majority, without conceding the likelihood of UHF entry into this market, then purport to consider the material designed, they say, to show CATV impact on a hypothetical market UHF. This involves reference to data in the study as to cable impact on the local stations in Bakersfield, although as I read the report this is designed to show impact on existing network affiliated stations as well as potential independents. They first criticize use of the Bakersfield experience "without sufficiently distinguishing other similar markets where no claim is made that CATV has had any injurious effect." I assume that the authors of the study, because of considerations of time and expense, felt they should study one of the six three-station markets having significant operating cable systems in their core cities. That seems reasonable to me, even assuming that they may have picked the one which preliminary inquiry showed to be the most favorable to the position of the broadcasters who commissioned their work. They explain their selection of Bakersfield in rational terms, and other grounds for distinction occur to me. If there are flaws in their reasoning—as to market selection or as to interpretation of the data—this should be examined in a hearing.

Beyond that, the majority comment that the report overlooks the fact that Bakersfield was one of the deintermixture markets and that it has had a history of economic problems. I don't understand the relevance of this. All that deintermixture involved was an equalizing of competition among the three stations in the market, and I do not see how that could either contribute to the alleged economic problems of the local stations or detract from the study's showing that CATV importation of distant signals has reduced the local stations' audiences. It is true that the Bakersfield market has shown an aggregate loss in

recent years, but the study does not rely on the earnings record of the stations there. Rather, it demonstrates a reduction in their audiences because of diversion to the distant stations imported by the CATV systems beginning in 1966. I do not see that this showing is impaired, because the local stations were already having economic difficulties.

The majority then say "nor is attempt made to show how CATV has compounded preexisting problems." This is clearly not true. The study shows that in 1965 the Bakersfield stations delivered 51,000 homes in prime time and 42,000 homes between 5 and 7:30 p.m., but that after cable operations commenced in 1966, these audiences were reduced in 1967 to 46,000 and 37,100, respectively, representing more than a 10-percent loss of audience in each case in spite of the fact that population in the area was growing. A special ARB analysis is then relied on to show that the CATV operations in Bakersfield were instrumental in causing these drops in ratings. This is deducible from the fact that an overwhelming percentage of non-CATV homes are shown to view the Bakersfield stations in all time periods, while from 26 to 68 percent of cable homes view the imported distant stations, depending on the time period involved.[4] From sign-on to signoff, 7 days of the week, the ARB report shows that 7 percent of noncable homes viewed non-Bakersfield stations, while 40 percent of cable homes viewed such non-local stations. This certainly seems to me to indicate that "CATV has compounded preexisting problems."

Of course, the majority are critical of the ARB report and the projections based upon it, but most of their criticisms are either overstated or actually in error. They point out that the ARB report states that its "data are below ARB minimum standards" and suggests that the results be treated as "indicative only." As I understand it, this simply means that because of the sample size, a small rating shown for a specific station in just one of the time periods measured may not be too reliable because the standard deviation is relatively larger in such individual cases. However, the confidence limit for an all day or total week measurement would be quite acceptable, especially when the thing sought to be measured is the breakdown between two groups of stations, as is the case here. In other words, there might be some question about the indication that KNBC had a 7-percent merto share on Tuesday at 7 p.m., but there is a high degree of probability that the three Bakersfield stations were, in fact, limited to about 50 percent of the audience Sunday through Saturday, sign-on to signoff. Thus, the majority should not completely reject this part of the report, as they do, but should simply analyze it with care in accordance with generally accepted ratings research procedures.

Then the majority say that no figures are given on the size of the CATV audience in Bakersfield so that it is not clear that the claimed drop in viewing of market stations could reflect CATV homes. The ARB report indicates that 25.7 percent of the homes measured were cable homes. According to the 1967 edition of "Television Factbook,"[5]

[4] Exhibit H of the study is modified by exhibit C to the reply to opposition to petition for continuance of temporary stay pending judicial review, filed by KOAA and KRDO on Apr. 19, 1968.

[5] The figure as to CATV penetration may, therefore, have increased significantly since then.

28.7 percent of the indicated potential homes subscribe to one or the other of the two cable systems in operation there. While these systems do not, of course, serve the entire market; there are other cable operations in the market. In any event, it would seem likely that cable penetration is sufficient to account for the more than 10 percent audience loss indicated. Certainly, enough has been shown to demonstrate that the matter should be explored in a hearing.

The majority next complain that the charts and graphs "do not discuss viewing habits in the crucial prime-time hours when the bulk of network revenues are earned, and when program exclusivity should be of maximum value." They point out, for example, that table II in exhibit H "only gives data from 7 to 7:30 p.m. and from 11 p.m. on." They conclude that the efforts to "*project* non-prime-time viewing patterns in Bakersfield into prime-time viewing in Colorado Springs-Pueblo is totally unpersuasive." [Emphasis added.] This is a plain misreading of the study. Table II does indicate the percentages of cable subscribers viewing non-Bakersfield stations in the periods referred to by the majority, because these are significant time periods, mostly nonnetwork, for which audience measurements are useful. But the table also gives figures for Sunday through Saturday, 7:30 to 9 p.m. and 9 to 11 p.m., and for Saturday, 7:30 to 11 p.m., and that certainly covers all prime time presented in three categories because some people are interested in this additional detail. Thus, there is no effort to "project" non-prime-time viewing into prime time, and the majority's stated ground for criticism simply does not exist.

The majority's last criticism is more valid, but still seems overstated. Table III in appendix H does start with an assumed 90,000 households which approximates the number of television homes in the Colorado Springs-Pueblo stations' metropolitan area (91,100—page 12), rather than just in the core cities themselves. But even if the figures in table III are reduced accordingly, they still indicate a likelihood of significant loss of revenue to the existing local stations in the event of quite probable CATV penetration of the core cities of this market. In addition, of course, it must be noted that if CATV operations of the kind involved here are to be permitted in Colorado Springs and Pueblo, then similar operations would have to be authorized in every community in the market. This, of course, would substantially increase the revenue loss projected in table III. So, again, I think the showing made calls for a hearing, and is certainly far too substantial to justify the majority's characterization of this part of the report as "not supported." There may be flaws in it, but it contains a great deal of material indicating the need for further exploration.

The majority dismiss exhibit L by saying that, to the extent it indicates that importation of the Denver stations will not provide significant additional program diversity, it impeaches arguments made elsewhere, since it reveals how little programing will not be protected under the program exclusivity rule. This completely ignores the fact that the exhibit specifically points out that many of the duplicating nonnetwork programs carried on the Denver network-affiliated stations are broadcast at different times than in Colorado Springs-Pueblo, so that the local stations' presentation thereof will not be protected

by our nonduplication rule. These programs—nearly 90 percent of the stations' programing, excluding local newscasts and feature films—when added to the nonduplicating programs of the Denver network affiliated stations and the probably totally different programs of the Denver independent station, represent a very significant increment in competing programing as to which the nonduplication rule will not apply. This is what will cause the audience fragmentation which the study demonstrates is likely to have such serious impact on the existing Colorado Springs-Pueblo stations, as well as the potential UHF stations which it shows might come into being. But for their mistaken interpretation, the majority agree that exhibit L has weight. Since their effort to weaken it is without basis, the exhibit, like so much else in the Coe-Saunders study, contributes to a very substantial prima facie showing that the importation of the Denver signals into this market will be inconsistent with the public interest.

In conclusion, the majority say that "although praiseworthy effort has been made to supply pertinent data, we conclude that the report is insufficient to show that hearing is warranted." As already indicated, this is the most substantial showing ever made in a case of this kind. It meets every test the majority has ever announced. It stands substantially unimpaired despite the majority's uncritical acceptance of the staff's efforts to undermine it. It is supplemented by substantial arguments in the other pleadings filed by the local stations and by other broadcast interests. If a hearing was ever indicated, it is required here! Yet the majority, without adequate explanation, reject all the contentions and showings of the broadcast parties. They seem determined to turn their backs on the broadcasters in the markets below the top 100. I cannot agree that this is in the public interest, so I must dissent.